U.S. Department of Justice

United States Attorney
Eastern District of New York

SLR:RKH:ZAC

271 Cadman Plaza East
Brooklyn, New York 11201

January 3, 2008

VIA ELECTRONIC CASE FILING
AND HAND DELIVERY OF COURTESY COPY

Honorable Viktor V. Pohorelsky
United States Magistrate Judge, EDNY
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. International Longshoremen's Ass'n., et al.*, Civil Action No. CV-05-3212 (Glasser, J.) (Pohorelsky, M.J.)

Dear Magistrate Judge Pohorelsky:

The United States respectfully submits this letter regarding two outstanding matters pertinent to discovery in the above-captioned action, both of which were raised during the most recent status conference held before Your Honor on November 19, 2007.

As a threshold matter, consistent with Judge Glasser's Order of November 1, 2007, the United States interposed a Second Amended Complaint in this action on Monday, December 31, 2007, a courtesy copy of which we enclose herewith.[1] The filing of this pleading, however, raises the larger question of deposition discovery in this action, which had been previously stayed by the Court, as well as the more discrete question of the United States' application to depose defendant John Bowers *de bene esse*. This latter application was filed by the United States on October 19, 2007, and has been held in abeyance by the Court pending the filing of a Second Amended Complaint, and the submission of supplemental letter briefs by the parties.

At the present time, for the reasons detailed below, the United States respectfully requests that the Court permit the parties to proceed with deposition discovery generally, in the absence of an adequate showing by Defendants that such discovery should be stayed, or, in the

[1] On January 2, 2008,the United States filed a corrected copy of this complaint, to make minor minesterial corrections and to remedy paragraph numbering errors. No substantive changes to the Second Amended Complaint have been made. The enclosed courtesy copy reflects these corrections.

alternative, permit the deposition of Mr. Bowers to proceed *de bene esse*, should the Court determine that Defendants can make a showing of need for a general stay of depositions.[2]

As the Court may recall, at the initial conference held in this case on February 22, 2006, Defendants sought, and Your Honor granted, a stay of deposition discovery in this action, and invited the parties to submit additional papers concerning whether such a stay should be maintained, and if, so, what form it should take. Both the United States and the Defendants duly filed such submissions, with the United States opposing any stay, and Defendants, led by the ILA, requesting that the Court "continue the stay of depositions in this action pending the District Court's ruling on the dismissal motions, or alternatively, to defer consideration of lifting the stay . . . until September 2006." Letter from Howard Goldstein dated June 5, 2006 (Docket No. 117). In the wake of these submissions, the Court maintained the stay of deposition discovery until May 22, 2007, at which time it was lifted. See Minute Entry for May 22, 2007 (Docket No. 253). They stay was re-imposed by Judge Glasser, however, on August 1, 2007, following an appeal of Your Honor's ruling by Defendants. See Memorandum and Order of August 1, 2007 (Docket No. 286).

As both Defendants' stay applications and Judge Glasser's August 1, 2007 Order reflected, the stay of deposition discovery was sought, and was granted "until th[e] Court ha[d] decided the parties motions to dismiss the Amended Complaint." Id. at 9.[3] In light of the relief requested by the Defendants, and by the language of Judge Glasser's August 1, 2007 Order, the stay of testimonial discovery – in accordance with the terms requested by the Defendants themselves – has now expired.

Accordingly, given the filing of the Second Amended Complaint, the United States respectfully submits that discovery should now be permitted to proceed as it would in the ordinary course of civil litigation, absent an application, and an appropriate showing, by the Defendants that depositions should continue to be stayed. As discussed in greater detail in the United States' prior submissions regarding the propriety of a stay, the party seeking such a stay bears the burden of making a "strong showing of good cause" for the extraordinary relief requested. Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985) (internal quotation omitted) (denying motion to stay discovery pending resolution of 12(b)(6) motion, utilizing "good cause" standard). See also Association Fe y Allegria v. Republic of Ecuador, No. 98 Civ. 8650 (BSJ), 1999 WL 147716 (S.D.N.Y. March 16, 1999) (same); Hachette Distribution, Inc. v. Hudson County News Co., 136 F.R.D. 356, 358 (E.D.N.Y. 1991) (denying stay pending motion practice, discussing various factors that have been considered by courts presented with the question). Defendants cannot make such a showing here.

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[2] At the November 19, 2007 conference, the Court remarked that efficacy of the previously-entered stay of deposition discovery re-imposed by Judge Glasser would survive the filing of a Second Amended Complaint. As shown below, however, the terms of the stay, and the grounds on which it was granted, do not support its extension, and should require a new showing of need by Defendants.

[3] The language of the other Defendants in requesting the stay was substantially the same as that of the ILA. In each and every case, the request sought continuation of the stay only until the pending motions to dismiss were resolved. See, e.g. Letter of Victor J. Rocco dated June 5, 2006 (Docket No. 115) (requesting, on behalf of the Metropolitan Marine Maintenance Contractors Association, and METRO-ILA Fringe Benefit Fund, that the "stay should be continued pending a resolution of the various motions to dismiss."); see also Letter of Donato Caruso and Kevin Marrinan dated June 5, 2006 (Docket No. 116) (asking, on behalf of the MILA defendants, that MILA "beneficiaries be given the opportunity to have MILA's motion to dismiss decided before their fund monies are required to be expended to defray the costs of MILA's participation in the deposition phase of this lawsuit."); Letter of John R. Wing dated March 12, 2007 (Docket No. 216) (voicing Defendant Bowers' request that the Court "continue the stay of deposition discovery . . . pending a decision by the District Court on Mr. Bowers' motion to dismiss.").

Based upon the positions articulated at the November 19, 2007 status conference, Defendants will likely argue that they once again intend to file dispositive motions with respect to the Second Amended Complaint, and that, because of the perceived merit of such motions, and the cost of depositions, a stay remains warranted. At the present time, however, Defendants cannot show that they are deserving of a continued stay.

As re-pled by the United States, the Second Amended Complaint stands on a starkly different footing than its predecessor. It both addresses the structural and pleading concerns raised by the Court in its November 1, 2007 opinion and order, and incorporates substantive RICO claims against several of the key defendants. To successfully show that a stay is warranted, the Defendants would accordingly have to show that this broader complaint, which addresses the Court's central concerns, nonetheless remains so likely to be dismissed that depositions should be held indefinitely in limbo, pending the briefing of, and decision on, Defendants' as-yet-inchoate motions.

Accordingly, the United States respectfully requests that the Court permit deposition discovery to proceed as a general matter. Given the number of deponents and the likely cost, should the Court wish to consider alternatives to unlimited deposition discovery, the United States would propose that depositions proceed in phases, with each side selecting witnesses in alternating fashion, and with the progress of such discovery being periodically reviewed and overseen by the Court.[4]

In the event that the Court does not believe that such a course of action is appropriate, and concludes that the general stay of deposition discovery should continue, or that it should be maintained pending an opportunity by Defendants to make a showing as to why they are still entitled to such a stay, the United States requests that the Court proceed to consider its pending application to depose defendant John Bowers *de bene esse*, so that the opportunity to examine this witness will not be lost, regardless of the Court's decision with respect to other examinations in future.

As a final matter, should the Court determine that the stay of testimonial discovery should be continued, or re-imposed, the United States would also request that it be permitted to conduct the deposition of non-party witness Frank "Red" Scollo, *de bene esse*. As the Court may recall, Scollo is a former ILA Vice-President, former President of ILA Local 1814, and a former member of the MILA Board, who is also an associate of the Gambino crime family who pleaded guilty to conspiracy to commit multiple acts of racketeering in violation of 18 U.S.C. § 1962(d) in United States v. Gotti, et al., No. 02 Cr. 606 ((E.D.N.Y.) (FB).

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[4] This proposal is, in practice, very similar to the plan discussed by all parties during the period of time between May 22 and August 1, 2007, when the stay of depositions was to have been lifted. Under this plan, Mr. Bowers deposition was to have been the first such examination, held in the first week of September, 2007.

As reflected in the Second Amended Complaint, Scollo played a key role in the Waterfront enterprise alleged by the United States, including but not limited to his participation in the Daggett election scheme, the MILA PBM selection, and a number of the extortion and fraud racketeering acts alleged in this case. See, e.g. Second Amended Complaint at ¶¶ 106-112, 120, 141, 163-73, 183, 192-200. Scollo is accordingly a key witness, whose testimony is likely to be both highly relevant and necessary at the trial of this action. As the United States has recently learned, however, Scollo is also apparently in ill health, and has previously sought to avoid deposition in another matter by virtue of his physical condition. See Letter of Raymond Granger Esq. to the Honorable Frederic Block dated October 16, 2007 (representing that "the health of Mr. . . . Scollo has been deteriorating significantly over the past few years" and on that basis seeking to avoid his deposition).[5] Accordingly, in addition to the fact that he is of advanced age, these concerns regarding Scollo's health warrant that he, like Mr. Bowers, be deposed as soon as practicable so that his testimony will not be lost. Accordingly, should the Court determine that a general stay of deposition discovery remain in place, the United States asked that Mr. Scollo's examination be permitted as an exception to such a stay, together with that of Mr. Bowers.[6]

We thank the Court for its time and consideration in this matter.

Respectfully submitted,

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[5] A copy of this letter is annexed hereto as Exhibit "A".

[6] In light of the breadth of the issues addressed herein, the United States respectfully requests permission to briefly exceed the three-page limit on discovery submissions imposed by the Court's Individual Rules of Practice.